

DEPARTMENT OF WATER RESOURCES

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November 9, 2012

Ms. Sue Fry,
Bureau of Reclamation
Mid-Pacific Region
Area Manager, Bay-Delta Office
801 I Street, Ste. 140
Sacramento, California 95814

Range of Alternatives for Remand Process for the Coordinated Long-Term Operation of the CVP and SWP

Dear Ms. Fry:

The Department of Water Resources (Department) provides the following comments to the Bureau of Reclamation (Reclamation) on the initial range of alternatives for the Remand Process for the Coordinated Long-Term Operation of the Central Valley Project (CVP) and the State Water Project (SWP). At the October 19th Invited Stakeholder meeting on the Remand Stakeholder Engagement (RSE) Process, Reclamation provided a power point presentation which included a slide setting out the initial range of alternatives for its analysis under the National Environmental Policy Act (NEPA). As explained below, the Department believes that the initial proposed action and the no action alternative should be the August 2011 Project Description. This description does not include the Reasonable and Prudent Alternatives (RPAs) set forth in the United States Fish and Wildlife Service (USFWS) 2008 Biological Opinion (BiOp) and National Marine Fisheries Service 2009 Opinion (collectively, BiOps).

1. The proper baseline for the NEPA analysis is a Project Description that does not include the RPAs

NEPA requires all federal agencies to prepare an environmental impact statement (EIS) to evaluate the environmental consequences of any proposed major federal action significantly affecting the quality of the human environment. 42 U.S.C. 4332(C). In its respective rulings regarding the need for Reclamation to conduct a NEPA analysis on the BiOps, the United States District Court for the Eastern District of California found that Reclamation's acceptance and implementation of the BiOps was the major federal action that triggered NEPA. *Delta Smelt Consolidated Cases*, 686 F.Supp.2d 1026, 1044-1045 (E.D. Cal. 2009); *Consolidated Salmon Cases*, 688 F.Supp.2d 1013, 1024-1025 (E.D. Cal. 2010).

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Given that the action to be analyzed as part of the remand process is the acceptance of the BiOps, it is critical to identify the correct no action alternative which describes the project description and serves as the baseline against which to compare the proposed action and the appropriate range of alternatives. In light of the Court's rulings, the appropriate baseline for the analysis is a project description without any RPAs. As the Court noted in its NEPA ruling on the consolidated smelt cases, "The critical inquiry is whether the BiOp causes a change to the operational status quo of an existing project." *Delta Smelt Consolidated Cases*, 686 F.Supp.2d 1026,1045 (E.D. Cal. 2009).

For example, in its ruling, the Court found that the implementation of the smelt BiOp RPA regarding Old and Middle River flow requirements reduced pumping by more than 300,000 acre feet in the 2008-2009 water year. *Id.* At 1050. The Court then discussed some of the adverse effects from this reduction, and concluded by stating "This, in and of itself, raises the kind of 'serious questions' about whether a project may cause significant degradation to the human environment, requiring NEPA compliance. That the Bureau must comply with NEPA is established as a matter of law." *Id.*

The Project Description submitted to USFWS in August 2011 is an update of the project description upon which both the USFWS and NMFS base their analyses of the effects of the proposed action and the subsequent development of the RPAs of the 2008 FWS BiOp and 2009 NMFS BiOp. Both of these project descriptions do not include the RPAs. Since Reclamation has been ordered to analyze the impacts of accepting and implementing these RPAs, it is reasonable that Reclamation would base its analysis upon a comparison of implementing these actions against the case of not implementing them. In light of this, and the Court's rulings discussed above, the proper baseline and no action alternative to use as the starting point for Reclamation's NEPA analysis is a project description that does not include the RPAs. The 2011 Project Description should be suitable for this purpose.

2. Reclamation must revise and expand the range of alternatives

In the March 28, 2012 Federal Register Notice, Reclamation states that the proposed action for the purposes of NEPA will consider operational components of the 2008 USFWS and the 2009 NMFS RPAs, and lists several management actions from the USFWS RPA that will be analyzed. The Notice also states that the proposed action will not consider structural changes prescribed in the NMFS 2009 RPA that would require future evaluation, environmental documentation, and permitting, as well as RPA actions that would require future studies. While the Notice seems to limit the analysis to the operational components of the USFWS RPA, discussions that we have had with Reclamation as well as the alternatives set forth in the October 19th power point make it clear that alternatives to the NMFS RPA will also be analyzed, at least those related to the San Joaquin River inflow/export ratio set forth

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in Action IV.2.1 of the RPA. The scope of the analysis needs to be expanded in order to comply with the District Court's rulings on the various challenges to the BiOps¹.

The initial range of alternatives set forth in the October 19th power point presentation seems to provide "bookends" for the analysis while allowing some variation on these limited alternatives. For example, Alternative 1 is described as the 2011 project description (which, in short, is the continued operation of the CVP and SWP without the RPAs from the BiOps), while Alternative 4 is described as the 2011 project description with the RPAs from the BiOps plus the Head of Old River Barrier, more stringent Delta outflow and San Joaquin River inflow/export requirements along with more extensive habitat restoration and measures to reduce stressors. In light of the Court's December 14, 2010 and September 20, 2011 rulings on the validity of the BiOps, the Department requests that a suite of alternatives be developed which would include more likely operational scenarios.

In addition, the Court ruled that the EIS must analyze the effect of Reclamation's acceptance and implementation of the BiOps, and not just certain actions within the RPA. Therefore the EIS should include an analysis of all potential actions that may be included in the RPA, rather than limiting the analysis to only those actions/alternatives listed in the March 2012 Notice of Intent. This will help ensure that Reclamation is in compliance with the Court's admonition that a legally sufficient NEPA analysis should identify and analyze alternatives that minimize harm to humans and the human environment. *Consolidated Salmon Cases*, 713 F.Supp.2d 1116,1125 (E.D. Cal. 2010). As the Court noted at the end of its ruling, Reclamation must conduct an in-depth analysis of the potential RPA actions through a properly focused study to identify and select alternative remedial measures that minimize jeopardy to affected humans and their communities, as well as protecting the threatened species. *Id.* At 1171. This can only be accomplished by analyzing the entire RPA and developing reasonable alternatives which can meet this standard.

Thank you for the opportunity to comment. Although we have discussed these points on several occasions, we apologize for submitting this comment letter past your specified deadline of October 31st.

¹ The rulings are the November 16, 2009 ruling on the need to conduct a NEPA review of the potential impact of accepting and implementing the 2008 USFWS BiOp RPA; the March 4, 2010 ruling on the need to conduct a NEPA review of the potential impact of accepting and implementing the 2009 NMFS BiOp RPA; the December 14, 2010 ruling on the 2008 USFWS BiOp; and the September 20, 2011 ruling on the 2009 NMFS BiOp.

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If you wish to discuss this in more detail, please contact me at (916) 653-1099.

Sincerely,

A handwritten signature in cursive script that reads "Katherine F. Kelly". The signature is written in black ink and is positioned above the typed name.

Katherine F. Kelly, Chief
Bay-Delta Office